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IN THE

Supreme Court of the United States

October Term, 1940.

No. 644.

THE H. W. GOSSARD CO., *Petitioner,*

v.

LOEBER'S, INC., *Respondent.*

Petition for a writ of Certiorari and Brief in Support Theroef.

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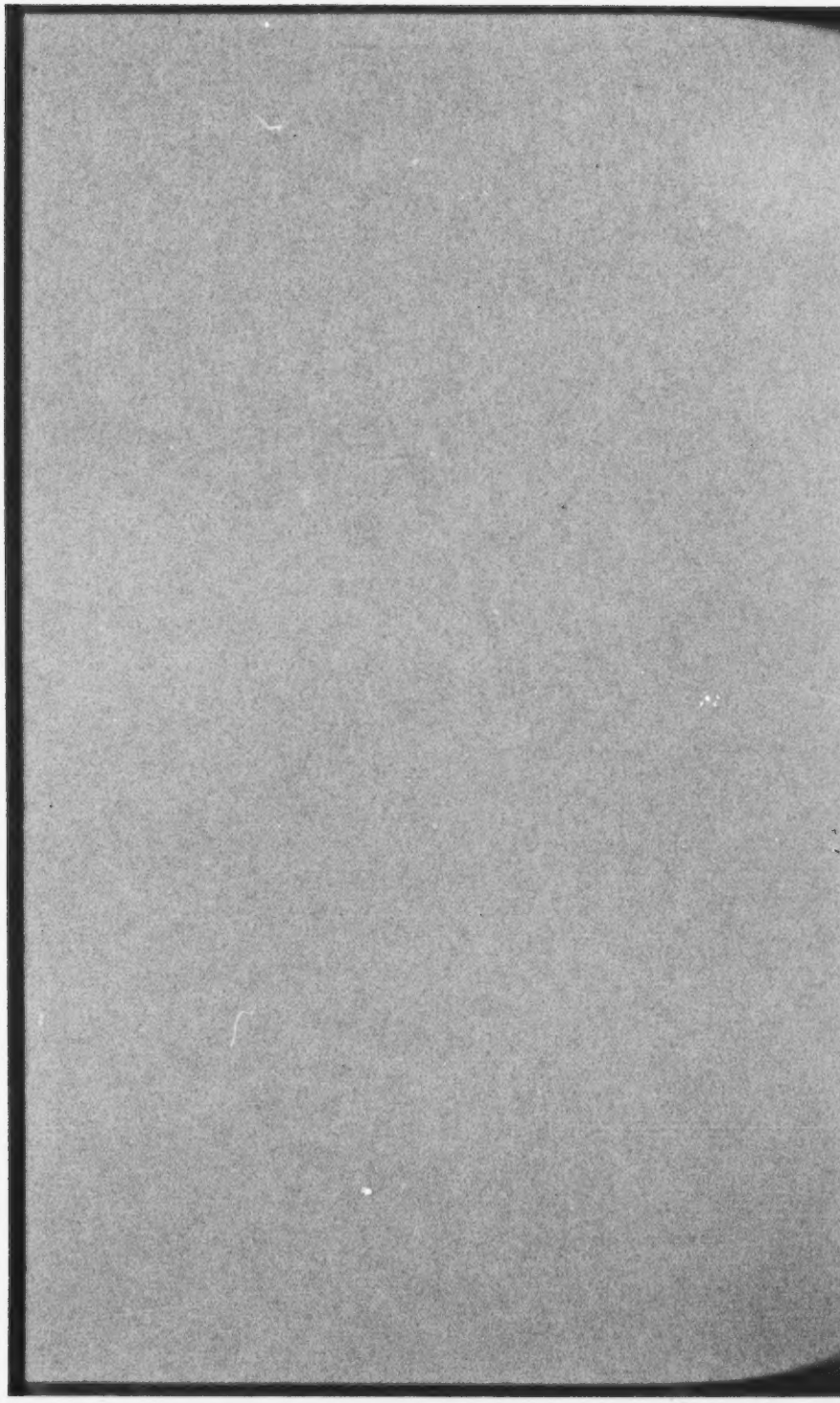

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IN THE

Supreme Court of the United States.

No. . October Term, 1940.

THE H. W. GOSSARD CO.,

Petitioner,

v.

LOEBER'S, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, The H. W. Gossard Co., respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court entered on June 24, 1940 (rehearing denied September 24, 1940), reversing a decree of the United States District Court for the Northern District of Illinois, Eastern Division (Barnes, J.) adjudging the two patents of petitioner in suit valid and infringed.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

Petitioner, The H. W. Gossard Co., brought this suit in the United States District Court for the Northern District of Illinois, Eastern Division, for infringement by respond-

ent, Loeber's, Inc., of the following United States Letters Patent owned by petitioner:

Patent No.	*Patentee*	*Claims*	*Application Filed*	*Patent Issued*
1,859,198	Cunningham	3-8 inc.	8/29/30	5/17/32
1,899,890	Cunningham	1	3/30/32	2/28/33

The District Court held the claims in issue of both patents valid and infringed and entered its decree awarding petitioner an injunction and an accounting (R. II, 578).

On appeal, the Court below reversed the decree of the District Court, holding the claims invalid for want of invention (R. II, 897). Rehearing was denied September 24, 1940 (R. II, 902).

Respondent at no time has denied infringement, if the claims are valid, and both Courts below have so found and held (R. II, 579, 890).

The patents in suit relate to women's foundation garments, and more particularly to a combination corset and brassiere, so designed and constructed as to support, mold and control the figure of the wearer by the application of mechanical pulls and forces.

Because the functions of these garments are truly and strictly mechanical, they are radically and fundamentally different from all other articles of wearing apparel, and must, therefore, be judged by function and not appearance.

The invention of the first or basic patent, No. 1,859,-198, may be most readily understood by reference to the drawings thereof (R. II, 592), which are reproduced upon the opposite page. The integrated combination garment there shown comprises a lower or corset part 5 to which the front portion 15 of the upper or brassiere part is sewn.

May 17, 1932. K. E. CUNNINGHAM 1,859,198

COMBINATION GARMENT

Filed Aug. 29, 1930

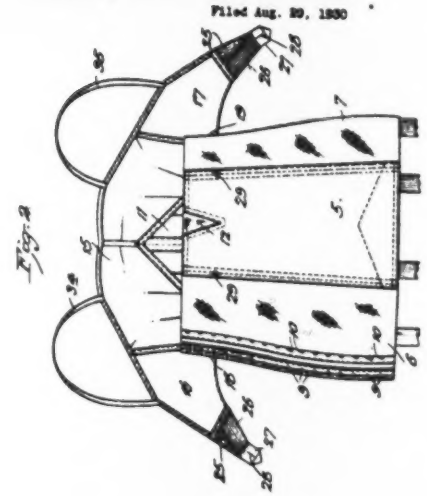

Fig. 2

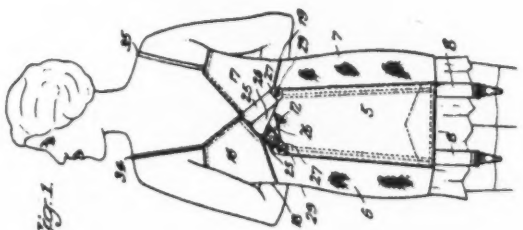

Fig. 1

INVENTOR
KATHERINE E. CUNNINGHAM
BY [signature]
ATTORNEY

To the ends of the front portion of the brassiere part and down the sides of the garment at 18 and 19 to a point adapted to lie below the diaphragm are sewn "end sections" or flaps 16 and 17 which extend rearwardly to overlie the back of the wearer. To the free end of each end section are secured elastic straps 25 and 26 terminating in a tab 27 having a fastening means such as a buttonhole 28 by which it is attached to the back of the lower portion of the garment. The end sections of the garment of Claims 3, 4, 5 and 7 of the patent and of the garments of both petitioner and respondent are crossed at the back.

In the preferred form of the garment, the elastic straps 25 and 26 attached to each end section diverge from the tab 27, in the form of a substantially horizontal V, so that the lower strap 26 of each pair is adapted to exert a pull along the lower part of its adjacent end section and across that portion of the corset adapted to cover the diaphragm and abdomen, while the upper strap 25 of each pair is adapted to exert a pull along the upper portion of its adjacent end section and across the upper part of the front portion of the brassiere. Shoulder straps 34 and 35, preferably of elastic material, are attached to the front portion 15 and to the end sections 16 and 17 respectively of the brassiere, so that the garment, when worn with garters 8 of elastic material attached to the stockings, will be kept in position yet permit freedom of movement of the wearer.

Claim 4, which is typical of the claims in issue of the first patent, is set out in the margin.[1]

---

[1] "4. A combination garment comprising a corset and a brassiere, said brassiere comprising a front portion adopted to cover the body across the busts and being sewn to the upper edge of the corset, end sections terminating in pairs of elastic straps, said end sections being sewn to

In the invention of the second patent in suit, No. 1,899,-890, the application for which was co-pending with that which eventuated in patent No. 1,859,198, a third and shorter horizontal strap 47 (as illustrated in Figure 4 of the second sheet of the drawings of that patent set opposite) is attached at a point intermediate each set of diagonal elastic straps and the end section of the brassiere portion of the garment. The shorter horizontal strap exerts a pull across the lower front edge of the brassiere and the upper edge of the front section of the corset in the region of the diaphragm, the construction being such that the various elastic straps come into play consecutively under different conditions of tension.

Claim 1 of Patent No. 1,899,890, which is the only claim of that patent in suit, is set out in the margin.[2]

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said front portion and down the side of the corset to about the waistline and adapted to be crossed at the back, shoulder straps attached to the front portion and the end sections, and means for fastening said pairs of elastic straps to the back of the corset, said straps in each pair diverging from the point adapted to be fastened to the corset so that one strap of each pair is adapted to exert a pull along the lower edge of its adjacent end section and across that portion of the corset adapted to cover the diaphragm and the other strap of each pair is adapted to exert a pull along the upper edge of its adjacent end section and across the upper part of the front portion of the brassiere adapted to cover the body above the busts."

[2] "1. A foundation garment comprising a brassiere adapted to cover the body across the busts and a connected front section adapted to cover the diaphragm and abdomen, flaps secured to the sides of said brassiere and down the sides of said front section to about the waist line, sets of elastic straps attached to the outer ends of said flaps and including an upper diagonal strap arranged to exert a downward pull on the upper front edge of the brassiere, a lower diagonal strap connected to the upper strap and diverging therefrom at an angle to exert an upward pull

Feb. 28, 1933. K. E. CUNNINGHAM 1,899,280

FOUNDATION GARMENT

Filed March 30, 1932 2 Sheets-Sheet 2

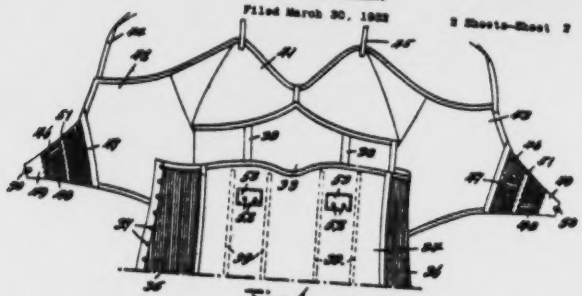

Fig. 4.

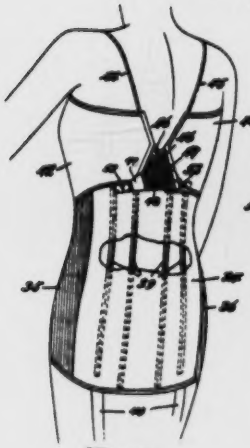

Fig. 8.

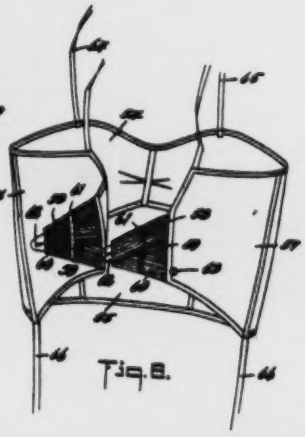

Fig. 8.

INVENTOR
KATHERINE E. CUNNINGHAM
BY
ATTORNEY

Objects sought and accomplished by the inventions are to "mold the figure throughout" (R. II, 593, line 4); to confine and mold correctly "the busts and the abdomen", (R. II, 593, lines 6-7); to confine the busts and give them "a correct uplift form", (R. II, 593, lines 49-50) without exerting uncomfortable pressure on the busts, (R. II, 593, lines 47-48); to provide "a flexible control adapted to accommodate itself to variations in the measurements of different individuals", (R. II, 601, lines 15-18); and to distribute increased tension uniformly over the portions of the garment, and the body of the wearer where it is most desired (R. II, 601, lines 53-55).

At the trial it was demonstrated and shown that stock garments of the same size made in conformity with the patents in suit adjust themselves with comfort to figures of different proportions though of the same general size. It was likewise shown by demonstration that the forces contributed by the elastics attached to the end sections of the garments of the claims in suit radiate from the point at which they are fastened to the back of the garment in such a manner as to exert an additional control and uplift over the abdominal region, the waist line and the diaphragm of the wearer, and help support, without compressing, the busts. (R. I, 34-42.)

The patents in suit are not paper patents. From 1930 to March 1, 1939, petitioner sold upwards of three million

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on said front section in the region of the abdomen, and a shorter horizontal strap secured to an intermediate portion of said diagonal straps in position to exert a pull across the lower front edge of the brassiere and the upper edge of said front section in the region of the diaphragm, and means for holding said straps under tension at the back of the garment."

garments made under one or both of the patents in suit (R. I, 44-45).

The garment of the second patent was first made April 22, 1931 (R. I, 96-97; PX35, 35-A).

Of forty-two patents and publications put in evidence by respondent in an attempt to show want of invention in the patents in suit, but two need now be considered. They are the so-called "Princette" publication (R. II, 533, 535), and the Patent to Kops No. 1,833,325 (R. II, 814).

Neither was regarded by the District Court as foreshadowing the inventions of the patents in suit. With respect to the Princette publication,[3] the District Court, in its opinion (R. II, 564), said:

> "Now, about the only—the chief similarity between that garment shown there, that Princette garment, and the plaintiff's exhibit made in accordance with its patent, is they both have two buttons on their back. It is most striking. That is the thing that first strikes the eye. I cannot see how there could be any force. In the first place I do not see that there is any elastic to make any force there. From that button in that picture in 209, how can there be any force applied to the abdomen? As a matter of fact, in that 209 Princette the straps come over the shoulder and down to those two buttons, and the lace brassiere is just carried over to the strap, that's all. That is what that is. There is no force applied from that. There, you have not the application of any force, as I can see it, except the force which holds, or goes to the strap up over the shoulder."

Upon that matter, the District Court found (R. II, 576):

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[3] For convenient reference, the two sheets comprising the Princette publication are set out in an appendix hereto.

"(84) The 'Princette' publication, the last item in Defendant's Exhibit 8, does not disclose a garment structurally or functionally like the garments of the patents in suit and does not anticipate the claims in suit."

Completely ignoring these views and findings by the District Court, the Court below, on appeal, made the following startling finding of fact with respect to the Princette garment:

"It has the end sections which are sewed down on the sides of the corset to the waist line, and converge in the back and *terminate in elastics. Moreover, there is one elastic on each side; they diagonally cross;* and each is buttoned to the back of the garment, as in Cunningham."[4]

The only evidence in the record pertaining to the Princette garment is that which appears in the Princette publication itself. One has only to glance at the illustrations appearing therein (R. II, 533, 535) to see that *on neither of those pages is there any disclosure of end sections which "terminate in elastics". There is on neither of those pages any disclosure that there "is one elastic on each side". And each of those pages shows quite clearly that neither the end sections nor the terminations thereof cross diagonally or otherwise.*

Speaking of the Kops patent, the District Court in its opinion (R. II, 563-64) said:

"* * * you have one of those girdles or step-ins, and you have a brassiere; and again I say there is no cooperation between those two garments except, as far

[4] Italics throughout the petition and brief are counsel's unless otherwise indicated.

as I can see, the brassiere is brought down a bit over the top of the corset so as to prevent folds of fat, if there are any, from rolling out over the top of the corset, and the corset does prevent, I suppose, the brassiere from slipping up.

"I cannot believe, counsel, for the defendant to the contrary notwithstanding, that there is any purpose in the invention to apply any force, any appreciable force in uplifting the abdomen or to restraining the diaphragm, or even to restraining the portion of the body above the breasts.

"That Fig. 44, on page 2, line 55, refers to:

> 'Extending from the extremity of the strap there is a tape 44 preferably made of elastic or other yielding material fitted at its free end with a button 45 adapted to engage in the button hole 37.'

"Now, then, it says:

> 'In order to maintain the tape 44 in position to prevent the central portions of the straps 34 and 41 from working upwardly, the tape 44 may be threaded through a loop 46 before the button 45 is caused to engage in the button hole 37.'

"Now, the only purpose of anchoring that tape, even though it be an elastic tape, is to prevent those two parts, adjoining parts, from working upward. Nothing said there about applying any force to the abdomen or diaphragm or to any other part of the body."

With respect to the Kops Patent, the District Court made its findings of fact Nos. 76-82 inclusive (R. II, 576).[5]

[5] Respondent did not adduce any testimony or evidence, expert or otherwise, with respect to the Kops patent. The disclosure of that patent (R. II, 814-819) and

From the decree thereupon entered by the District Court awarding petitioner an injunction and an accounting, respondent appealed to the Court below; and that Court, basing its decision solely upon the same Kops Patent No. 1,833,325 and the Princette publication, held the patents in suit invalid for want of invention and reversed the decree of the District Court.

In so doing, the Court below not only disregarded and set aside the findings of the District Court without pointing out wherein the evidence failed to support such findings, but substituted for the findings of the District Court findings of its own which are wholly without foundation in the record.

Moreover, in construing the Kops patent and the Princette publication, the Court below departed from the actual disclosures of those references and read into them modifications, the only basis for which is found not in the prior art but in the teachings of the patents in suit.

Petition for rehearing, pointing out these errors by the Court below, was denied by the Court below without opinion on September 24, 1940 (R. II, 902).

QUESTIONS PRESENTED.

(1) Whether Rule 52 (a) of the Federal Rules of Civil Procedure, providing that "Findings of fact shall not be set aside unless clearly erroneous", does not make it mandatory upon the Circuit Court of Appeals to accept the findings of the District Court, in the absence of a deter-

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the testimony of petitioner's expert with regard thereto (R. I, 109; 116-119) therefore stand unchallenged and uncontroverted in the record of the case at bar, and it is upon that disclosure and testimony that the findings of the District Court are based.

mination by the Circuit Court of Appeals that such findings are unsupported by, or contrary to the weight of, the evidence.

(2) Whether, under Rule 52 (a) of the Federal Rules of Civil Procedure, the Circuit Court of Appeals is justified in setting aside and ignoring the findings of the District Court, without first determining that such findings are "clearly erroneous".

(3) Whether, under Rule 52 (a) of the Federal Rules of Civil Procedure, the Circuit Court of Appeals is, without giving any consideration whatever to the findings of the District Court, justified in setting aside such findings and in substituting therefor findings of its own.

(4) Whether the Circuit Court of Appeals, in any event, is justified in substituting for the findings of the District Court findings of its own which are wholly without foundation in the record or evidence before it.

(5) Whether the Circuit Court of Appeals is justified in departing from the actual disclosures of certain alleged prior art references and the uncontradicted testimony with respect thereto, and in reading into such references modifications or amendments thereof, the only basis for which is found in the teachings of the patents in suit and nowhere in the prior art.

(6) Whether Claims 3 to 8 inclusive of Patent No. 1,859,890 and Claim 1 of Patent No. 1,899,198 are valid.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The discretionary power of this Court to grant the writ of certiorari is invoked upon the following grounds:

(1) Rule 52 (a) of the Federal Rules of Civil Procedure, which have, by Statute, the force of law, provides that "Findings of fact shall not be set aside unless clearly erroneous". Yet the Circuit Court of Appeals in this case reversed the decree of the District Court made mandatory by the findings of fact of that Court, without adjudging those findings "clearly erroneous"; and thereby the Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

(2) In reading into an alleged prior art patent and publication certain modifications not disclosed therein, the only basis for which is found in the disclosures and teachings of the patents in suit and nowhere in the prior art, the Court below has decided a federal question in a way probably in conflict with an applicable decision of this Court.

(3) In reading into an alleged prior art patent and publication modifications whose only basis is found in the inventions of the patents in suit and nowhere in the prior art, and in thereupon using such modified prior art references to invalidate the patents in suit, the Court below has rendered a decision in conflict with decisions of other Circuit Courts of Appeals upon the same important question of federal law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of

Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of said Circuit Court of Appeals, in the case numbered and entitled on its docket No. 6995, "The H. W. Gossard Co. v. Loeber's, Inc.," to the end that this case may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals for the Seventh Circuit be reversed and that petitioner be granted such other and further relief as to this Honorable Court may seem meet and proper.

THE H. W. GOSSARD CO., Petitioner,
By HUGH M. MORRIS,
FREDERIC BURNHAM,
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